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No. 97-569

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

BURLINGTON INDUSTRIES, INC.,

Petitioner,

vs.

KIMBERLY B. ELLERTH,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT

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STATEMENT OF THE CASE

A. Statement of the Facts

Respondent, Kimberly B. Ellerth was employed by petitioner, Burlington Industries, Inc. from mid-March, 1993 until May 31, 1994 as a Merchandising Assistant and then as a Sales Representative at the Chicago, Illinois office. (JA99, JA118, JA121.)[1] During Ellerth's job interview with Ted Slowik, Vice President of Sales and Marketing for Burlington's Mattress Ticking Division, Slowik asked Ellerth if she was married, if she was planning on having a family, and if she was "practicing" to have a family, and stared at Ellerth's breasts and legs for "constant" and "prolonged periods of time." (JA18-21, JA31-33.) Ellerth understood Slowik's question regarding "practicing" to have a family to refer to her sexual relationship with her husband and she took great offense at that inquiry. (JA20-21, JA152.)

As a Merchandising Assistant, Ellerth reported to Mary Strenk Fitzgerald, National Accounts Manager, who, in turn, reported to Slowik. Ellerth was required to speak with Slowik by telephone about once per week. (JA119-120.) There were sexual innuendoes by Slowik in "all phone conversations" with Ellerth, such as: "How are those legs of yours, Kim, ha, ha, ha" "Are you still practicing to have a family with your husband?" and "It must be hard for a woman like you, Kim, to have a job like that — a woman with great legs."[2] Ellerth testified that "every time [she] was on the phone with [Slowik she] ended up most — in tears." (JA71.) During Ellerth's summer 1993 New York training trip, Slowik told her several offensive sexual jokes. (JA21-22.) At a lunch meeting, attended by Angelo Brenna, Vice President of International Sales, Slowik told approximately twenty offensive sexual jokes about

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1. References in this brief to "JA" followed by a number or numbers are intended to refer to a page or pages in the Joint Appendix filed by Petitioner on March 4, 1998.

2. JA45-47, JA52, JA56, JA137, JA168, JA170.

"breasts, sex acts, along those lines."[3] During one of these jokes, Slowik reached over and grabbed Ellerth's knee under the table, causing Ellerth to pull her knee away. Ellerth found Slowik's touching of her knee to be highly offensive and unwelcome. (JA27-29, JA154, JA164.) On the walk back to the office from the New York lunch meeting, as Ellerth walked three to four feet ahead of Slowik and Brenna, Slowik stated, "you have got great legs, Kim. What do you think Angelo [Brenna]?" Ellerth turned to see that Slowik was staring at her legs as he made this comment. Ellerth felt "humiliated" and "degraded" by the comment, and kept walking. Brenna made a response to Slowik's comment about Ellerth's legs, and Slowik continued his dirty joke-telling. (JA29-31, JA133, JA148, JA154, JA165.)

During Ellerth's training trip to Greensboro, North Carolina, in the summer of 1993, and in front of a Sales Representative named Dan and Dan's wife, Slowik made a series of "sexually offensive" comments about a waitress which offended and embarrassed Ellerth. Later, Slowik invited Ellerth to the hotel lounge; Ellerth felt compelled to accept the invitation since she was on a business trip for Burlington and Slowik was her supervisor. At the hotel lounge, Slowik remarked to Ellerth that the all-female band members had nice breasts and legs as he gazed at length at Ellerth's own. Regarding breasts, Slowik stated, "[y]ou are a little lacking in that area, aren't you, Kim?" Ellerth was very humiliated and offended by this comment. When Ellerth did not respond positively to Slowik's sexually offensive behavior, Slowik told her that she should "loosen up." While exiting the lounge to go to their hotel rooms for the night, Slowik told Ellerth, "[y]ou know, Kim, I could make your life very hard or very easy at Burlington." Ellerth understood Slowik to clearly imply that she would have to engage in sexual relations with him in order to succeed in the business. (JA33-44, JA155-156, JA165-168.)

In October 1993, at the Chicago, Illinois, office, Slowik used Ellerth's chair and desk while placing some telephone calls and

3. JA23-29, JA44-45, JA132, JA148, JA154, JA164.

stated to Ellerth, "it's nice to have my butt where your butt was, Kim." Also in the fall of 1993, while Ellerth was folding fabric samples on the floor for a meeting with a client, Slowik approached her with Laura Peffal, a Customer Service Representative, and stated to Ellerth (from an upright position and while Ellerth was already on her knees), "on your knees again, Kim." Ellerth understood this comment to be a reference to fellatio.[4] (JA47-49, JA157, JA169.)

At Burlington's holiday party in December, 1993, Slowik walked by Ellerth and patted her butt with his hand, which her husband, Steve Ellerth, witnessed. Also at this company party, Slowik approached Ellerth's husband, patted him on the shoulder and stated, "you are a lucky man to have a woman like that," as he looked at Ellerth's legs and "rear end." (JA52-56, JA170.)

At Slowik's March 15, 1994 promotion interview of Ellerth in Des Plaines, Illinois, Slowik told Ellerth that he "had [his] hesitations about having [Ellerth] in this [Sales Representative] position." Ellerth confronted Slowik by stating, "I heard you called me arrogant," and Slowik answered, "[y]es, I did." When Ellerth asked, "[i]s it because I'm not loose enough for you, Ted?" (referring to Slowik's instruction at the hotel lounge for Ellerth to "loosen up"), Slowik answered "yes." Ellerth understood Slowik to mean that she was not sexually loose enough for him, especially since Slowik then reached over and rubbed her knee. Ellerth pulled

4. Ellerth recalled other incidents from March 1993 to December 1993 where Slowik made sexually harassing comments to her, both in person and on the phone, but could not recount the specifics of those incidents. (JA52, JA157, JA169.)

Although the district court ruled that pre-December 20, 1993 comments did not fall within the "continuing violation" doctrine, it made clear that "this does not require that an 'iron curtain' be dropped on December 20, 1993, shielding from consideration all evidence of Slowik's conduct before that day. . . .". (Pet. App. 261a.) The district court further stated that it would be "absurd to conclude that Slowik's conduct after December 20, 1993 had to be evaluated in a vacuum and without the context of his prior conduct." (Pet. App. 262a.)

her knee away. Ellerth was very embarrassed and humiliated by Slowik during this interview.[5] About two weeks after this promotion interview, Slowik telephoned Ellerth and told her that he was promoting her because a supervisor subordinate to Slowik wanted her in the position. Slowik also commented, "you're gonna be out there with men who work in factories, and they certainly like women with pretty butts/legs." Ellerth was crying by the time she hung up the telephone.[6] (JA68-71, JA159-160, JA173.)

In March, 1994, Ellerth travelled to a San Francisco, California bedding conference to be trained as a Sales Representative. Slowik ignored Ellerth for the first three to four days of the conference because she "had not responded favorably to his sexual harassment."[7] Slowik finally spoke to Ellerth by making a sexually inappropriate comment about her "ass" while he stopped and stared "in a very sexual way" "for a prolonged period of time" at Ellerth's "back end." (JA71-76, JA143, JA160, JA174.)

In April, 1994, Slowik told Ellerth (who is blonde) an offensive joke about a blonde, a limo and sex: "What's the difference between a blonde and a limo? Not everyone's been in a limo." (JA76, JA160, JA174.)

During a telephone call in May, 1994, when Ellerth made a business inquiry to Slowik seeking permission to insert a customer's logo into fabric, Slowik responded "I don't have time for you right now, Kim — unless you want to tell me what you're wearing." Ellerth declined to do so, said she had to go and hung up. Ellerth understood that Slowik wanted her to tell him she was wearing a

5. JA57-59, JA64-68, JA121-123, JA159, JA172.

6. After her promotion to Sales Representative, Ellerth reported to Patrick Lawrence, National Sales Coordinator, who reported to Slowik. (JA60, JA121, JA123.)

7. JA71-72, JA143, JA173; Doc. 18, Ex. C, pp. 218-219, 222, 224. References in this brief to "Doc." followed by a number are intended to refer to the document filed in the district court and referenced by that number in the Civil Docket Sheet reproduced at JA1-9 of the Joint Appendix.

"nighty [sic] or something" or "a short skirt . . . or something that would give him a little thrill during the day." (JA77-78, JA80, JA82-84, JA174.) A day or two later, when Ellerth had to call Slowik back again for permission to fill the customer's request, Slowik refused and asked, "are you wearing shorter skirts yet, Kim, because it would make your job a whole heck of a lot easier." This conversation made it clear to Ellerth that she "was not going to be going forward in [her] job and [the] sexual harassment was going to continue by Mr. Slowik." Ellerth resigned her position at Burlington shortly after this telephone call.[8]

During her fourteen months of employment at Burlington, Ellerth complained about Slowik's sexual harassment to a number of managerial and non-managerial employees. In early 1994, Ellerth complained to Donna Thibideau, Customer Service Manager, about Slowik's sexual harassment. In response, Thibideau informed Ellerth that another employee, Ann Pillow, might also have been sexually harassed by Slowik.[9] After the New York lunch meeting with Slowik and Brenna in the summer of 1993, Ellerth complained to Laura Peffal, a Customer Service Representative, and another employee, Marilyn, about Slowik's behavior. Both employees responded that Ellerth's complaints sounded "typical" of what occurred when Slowik and Brenna got together.[10] The week after the San Francisco conference, Ellerth complained to Patrick Crosson, a Sales Representative, about Slowik's sexual harassment and discussed Slowik's possible sexual harassment of Pillow. Crosson told Ellerth that Slowik and Patrick Lawrence, another supervisor, had asked him whether Ellerth was planning on having a family in the near future.[11] Ellerth also complained about Slowik's sexual comments and actions to Sherry Hester, a

8. JA15, JA79-85, JA175; Doc. 18, Ex. C., p. 273.

9. JA107-108, JA148, JA171; Doc. 18, Ex. C, pp. 176-80; Doc. 14, Ex. B, no. 6.

10. JA106-107; Doc. 18, Ex. C, p. 83.

11. JA104-105, JA148; Doc. 18, Ex. C, p. 179, 218-19, 222, 224; Doc. 14, Ex. B, no. 6.

Customer Service Representative and to Brent Schneider, a Sales Representative.[12] In addition, at least three employees, including a vice president, witnessed Slowik's sexual harassment of Ellerth first-hand.[13]

Ellerth contemplated incorporating in her May 31, 1994 resignation letter further complaints about the sexual harassment, but, out of fear of retaliation, she removed those references with correction fluid.[14] About two weeks later, Ellerth sent a second letter to Lawrence stating, in part:

> I briefly mentioned [the real reason why I quit] in my [resignation] letter, but I did not get into it because I was afraid to. Before I was hired, you and I spoke about the reasons why Ted [Slowik] didn't feel comfortable around me. I told you that he had said some sexually inappropriate things to me in the past. What I didn't tell you was that he had, on two occasions, patted my rear, and every time he saw me looked me up and down like a piece of meat. . . . On my first trip to N.C. to train . . . [I was] very upset because [Slowik] kept making sexual comments about the women on the stage [at the hotel lounge]. We got up to leave and as we were walking out, he patted my rear and said he could make my life at Burlington very easy or very hard. . . . This is why Ted "couldn't put his finger" on why he did not want me to have the job. . . . I don't expect you to do anything about this because as I had been told

12. JA105, JA108-109, JA148; Doc. 18, Ex. C, p. 180, 218-19, 222, 224; Doc. 14, Ex. B, no. 6.

13. Brenna (Vice President of International Sales), Laura Peffal, and Dan (last name not identified), a Sales Representative. Ellerth also told her husband, her parents, and a Burlington customer, Cara Jimenez, about the sexual harassment as it was occurring. (JA148-149; Doc. 18, Exs. C pp. 187-88, F, G, H; Doc. 14, Ex. B, no. 6.)

14. JA10-14, JA99-103, JA109-110, JA114-115, JA161; Doc. 14, Ex. D3.

> before. Ted is just Ted. My entire time at Burlington, I had to ignore Ted [Slowik] and try to do what I needed to do in my job. But I finally had it when I spoke to Ted on the phone during my last weeks and he said to me, "This job must be hard for a woman like you." I replied, "like what?" He then said, "An attractive woman with great legs; you should wear shorter skirts." Ted made my life with Burlington unbearable. I just thought you should know, although I'm sure you are not surprised.

(JA15-16, JA126-127, JA161.)

Although petitioner now argues that Ellerth's "resignation" on May 31, 1994 was related to work performance issues, respondent introduced evidence below that controverted this claim.[15]

B. Procedural History of the Case

Ellerth brought this suit against Burlington in the United States District Court for the Northern District of Illinois, Eastern Division, alleging sexual harassment and constructive discharge under Title VII of the Civil Rights Act of 1964, as amended, November 21, 1991, 42 U.S.C. § 2000e, *et seq.* ("Title VII"). The district court's jurisdiction over the case was under 28 U.S.C. § 1343(4).

Burlington moved for summary judgment against Ellerth in the district court claiming that: (1) the "hostile work environment" sexual harassment was not sufficiently severe or pervasive; (2) Burlington was not liable for the "hostile work environment" or the "*quid pro quo*" sexual harassment against Ellerth; and (3) Ellerth was not constructively discharged.

The district court held that it had "little difficulty in concluding that Ellerth has raised a genuine issue of material fact as to whether she was subjected to a hostile work environment as a result of Slowik's conduct." (Pet. App. 262a-263a.) Regarding "quid pro

15. JA85-97, JA123-125, JA160; Doc. 18, Ex. J, no. 4.

quo" sexual harassment, the district court held that Ellerth, in labeling her allegation "sexual harassment" in her charge of discrimination, had failed to state a separate claim for "quid pro quo" sexual harassment. In so ruling, however, the district court acknowledged that "imbedded in Slowik's harassment of Ellerth is a quid pro quo proposition." (Pet. App. 216a-217a, 219a-220a, 264a, 284a.) The district court granted Burlington's summary judgment motion, concluding that the common law of agency did not lead to employer liability in the context of "hostile work environment" sexual harassment.[16] (Pet. App. 261a-280a, 283a-286a.)

Ellerth appealed the district court's ruling to the United States Court of Appeals for the Seventh Circuit, which reversed the district court decision in its entirety. Judges Bauer, Rovner and Diane P. Wood held that: (1) Ellerth had properly plead both "types" of sexual harassment as no requirement existed that complainants plead the judicially-created sub-theories of sexual harassment at the time of their charge of discrimination; and (2) Burlington was liable for both "types" of sexual harassment by Slowik under a "scope of authority" analysis.[17] *See* Restatement (Second) of Agency, § 219(1). (Pet. App. 219a-221a, 230a-231a.)

Burlington thereafter filed a petition for rehearing *en banc*, which, after briefing, was granted by the Seventh Circuit, vacating the three-judge panel decision. Nine of the twelve judges of the *en*

16. Restatement (Second) of Agency (1958). While acknowledging that "quid pro quo" sexual harassment "has generally been treated as giving rise to strict liability on the part of the employer," the district court concluded, in dicta, that agency principles similarly did not lead to employer liability for "quid pro quo" sexual harassment. The district court then granted summary judgment on Ellerth's constructive discharge claim because "Slowik's conduct cannot be imputed to Burlington." (Pet. App. 286a.)

17. The Seventh Circuit's decision did not explicitly address Ellerth's constructive discharge claim, but remanded the case for further proceedings consistent with its opinion that liability could be imputed to Burlington for the supervisory sexual harassment. (Pet. App. 239a.)

banc panel affirmed the prior decision holding Burlington liable for the "quid pro quo" sexual harassment against Ellerth. While the three-judge panel had held Burlington liable for sexual harassment under a "scope of authority" analysis, the majority of the *en banc* panel held Burlington liable for the "quid pro quo" sexual harassment under either a "delegated authority" or a "scope of authority" theory.[18] (Pet. App. 6a-7a, 173a.) The majority of the *en banc* panel maintained the judicially-created distinction between "hostile work environment" and "quid pro quo" sexual harassment, while Judges Wood, Easterbrook and Rovner did not separate Ellerth's claims into these two separate categories of sexual harassment.[19] (Pet. App. 6a-7a, 178a-179a.)

SUMMARY OF ARGUMENT

Title VII does not create two separate and distinct legal claims — quid pro quo and hostile environment — with different liability rules and remedies. Rather, a sexual harassment plaintiff, like any other Title VII plaintiff, must establish that the discrimination complained of was action by the "employer." Only individual human beings can commit discriminatory acts; the issue under Title VII is which actions by which employees are to be treated as employer action.

The most important agency principle in Title VII cases is that employers are liable for injuries caused by supervisors who use or abuse their official powers. Restatement (Second) of Agency

18. Ellerth was held to have waived the negligence theory determined necessary to her "hostile work environment" claim by the majority of the *en banc* panel by her reference to § 219(b) of the Restatement (Second) of Agency in the three-judge panel reply brief. (Pet. App. 6a; 28a; 59a; 174a, n.1; 214a; 199a-202a.) *See* Respondent's Brief in Opposition, p. 21, n. 20; Respondent's Cross-Petition for a Writ of Certiorari, p. 21, n. 16.

19. *See* Respondent's Brief in Opposition, pp. 9-12, and Respondent's Cross-Petition for a Writ of Certiorari, pp. 6-10, for summaries of the *per curiam* and separately-authored opinions of the *en banc* panel of the Seventh Circuit.

§ 219(2)(d). It is because of this principle that employers are legally responsible if a supervisor dismisses a worker because he is black, regardless of whether such discrimination violated company policy. This doctrine is consistent with the decisions of this Court that action by government officials who abuse their authority is nonetheless state action under color of law. "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). These decisions identify the actions that are the "responsibility" of a state or its agencies for which they can "fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982).

The district court correctly observed that "it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth." (Pet. App. 277a.) A supervisor's implied threat of dismissal is a use of his authority, even if no dismissal occurs, just as a bank robber who brandishes a gun is using that weapon regardless of whether he ever fires it. *Bailey v. United States*, 116 S. Ct. 501 (1995). This Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1977), expressly rejected the contention that non "tangible" injuries should be treated differently under Title VII.

In 1991, when Congress amended Title VII to authorize awards of damages, it expressly rejected proposals to require harassment victims to utilize an employer's internal complaint procedures. Under section 706 respondent was only required to, and did, file a charge with the Illinois Department of Human Rights; Title VII does not authorize the courts or petitioner to create an additional requirement that she also file first with the Burlington Industries Department of Human Resources.

Reprisals against sexual harassment victims who complain to their employers is a serious problem. A victim who files such a complaint is gambling her job, if not her career, on the outcome.

An implicit purpose of any supervisor's threats is to deter his victim from complaining about his harassment; that victim should not be sanctioned if she submits to that demand.

The record in this case contains substantial evidence that respondent was the victim of severe and pervasive harassment, and that Slowik's actions were facilitated by abuse of his position. A finding of liability for that harassment would establish a basis as well for respondent's constructive discharge claim.

ARGUMENT

INTRODUCTION

The very language of the Question Presented posed by petitioner reflects a fundamental misconception regarding the nature of Title VII. The question framed is whether "a claim of quid pro quo sexual harassment may be stated under Title VII" in certain specified circumstances. (P.Br. i.) Petitioner's central contention is that only certain particular situations can properly be treated as a quid pro quo "claim"; all other harassment is to be classified, and treated differently, as a "hostile work environment" claim. Proceeding from the assumption that Title VII recognizes two legally distinct and mutually exclusive types of harassment claims, quid pro quo and hostile environment, each with separate rules regarding employer liability, petitioner advances arguments regarding whether the facts of this case constitute a genuine quid pro quo claim.[20] Several of the opinions in the court of appeals proceeded on the same assumption.

The actual terms of the statute, however, make no reference to either quid pro quo demands, hostile work environments, or even sexual harassment. A sexual harassment claim, like any other claim under section 703(a)(1) of Title VII, must meet three statutory requirements: (1) it must involve "discriminat[ion]" on the basis of race, color, religion, sex, or national origin; (2) the

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20. *E.g.* P.Br. 11 (discussing correct "definition" of quid pro quo harassment), 17 (paradigm of "classic" quid pro quo harassment).

discrimination[21] must affect the plaintiff's "compensation, terms, conditions, or privileges of employment"[22], including discrimination in hiring or dismissal; and (3) the discrimination must have been the act of an "employer."[23] The sufficiency of the allegations in the instant case turn on the meaning of these statutory terms, not on a debate about the distinction between the proper definitions of "quid pro quo" and "hostile work environment," phrases which only appeared in caselaw[24] and in legal and sociological literature more than a decade after the 1964 enactment of Title VII itself.[25]

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21. The anti-retaliation provision of Title VII, § 704(a), is broader than section 703(a)(1), since it prohibits *any* discrimination against applicants or current or former employees for having opposed practices made unlawful by Title VII. Section 704(a) thus covers, not only retaliatory discrimination affecting the terms and conditions of a victim's employment, but other forms of retaliation as well. *E.g. Robinson v. Shell Oil Co.*, __ U.S. __, 117 S. Ct. 843 (1997) (denial of job reference).

22. "The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale v. Sundowner Offshore Services, Inc.*, __ U.S. __, 66 U.S.L.W. 4172 (March 4, 1998).

23. Section 703(a)(1) states that:

> It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

24. The decisions of this Court, although noting that these phrases may be useful in understanding the phenomenon of sexual harassment, have not attached to the phrases any fixed, legally distinctive or mutually exclusive meanings.

25. Catharine A. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).

Petitioner's brief concerns a hypothetical case in which a supervisor, although threatening a subordinate, never actually resorts to any reprisals or obtains any form of submission to his demands. Those simply are not the circumstances of this case. Slowik's threats were not limited to or focussed on dismissal of respondent; Slowik warned her that he could "make your life very hard . . . at Burlington", and he certainly made good on that threat. Slowik's demands were not limited to, indeed never specifically focussed on, sexual intercourse; his sexual interests clearly included whatever pleasure he took from touching respondent and making her listen to dirty jokes. What Slowik demanded of respondent was that she neither actively resist this conduct, e.g. by openly rebuking him or slapping him as she might a stranger on the street, nor complain to his superiors. In this regard Slowik's threats were largely successful.

Petitioner devotes much of its brief to arguing that it would be unfair to hold an employer "strictly liable" for back pay or damages under the circumstances alleged in the complaint. Petitioner, however, does not deny that the facts alleged in the complaint are sufficient to constitute discrimination, or that those facts, if proven, would establish an adverse alteration of the terms and conditions of respondent's employment. The issue here is thus only whether under the circumstances of this case the discriminatory employment practices alleged in the complaint can be said to be acts of an "employer" under Title VII. If in a given case the discriminatory actions complained of are determined not to be the actions of an "employer", then the actions would not be prohibited by Title VII at all; that would mean that the victimized employee could not obtain even injunctive or declaratory relief.[26] Thus the burden on petitioner is to establish that Title VII does not prohibit the events alleged in this case. Whether factors relied on by petitioner

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26. For example, even if a supervisor harassed an employee so severely that she resigned, a finding that the actions in question were not those of an "employer" would mean that the victim could not sue at all. The district court construed Title VII in just this manner. (Pet. App. 266a n.11, 286a-287a.)

might, following a finding of liability, be considered by the trier of fact in deciding whether to award punitive damages is at this point premature.

I.

SEXUAL HARASSMENT BY A SUPERVISOR CONSTITUTES ACTION BY THE EMPLOYER WHERE THE PERPETRATOR USES OR IS AIDED BY HIS SUPERVISORY POWERS.

A. The Action of A Supervisor Who Utilizes His Authority or Position to Engage in Sexual Harassment Or Other Discrimination is "Employer" Action Under Title VII.

The district court correctly observed that "it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth." (Pet. App. 277a.) That circumstance is sufficient to establish that the harassment in question was "employer" action under Title VII.

The only manner in which an employer ever acts is through the conduct of particular human beings; the question of whether a specific action is the action of an "employer" under Title VII is thus ipso facto a question about which actions of which employees should be characterized as actions of the employer. The applicable legal principles which determine the meaning of "employer," and thus the scope of Title VII's prohibitions, affect not only claims of sexual harassment, but any type of discrimination. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986), this Court directed the lower courts to look to the principles of agency law in resolving under Title VII the issue of whether the particular conduct of a given supervisor or other worker is the action of an "employer."

Agency principles identify a number of distinct circumstances in which actions taken by an employee are deemed to be actions of the employer.[27] The employer is legally responsible if: (1) the

27. *E.g.* Restatement (Second) of Agency, §§ 213, 219.

employee was "aided in" his actions by his position with or relationship with the employer; (2) the employee acted within the scope of his employment[28]; (3) the employee had apparent authority to engage in the specific act in question; (4) the employer[29] had actual or constructive knowledge of the action in question; (5) the employer was negligent in failing to prevent the action in question; (6) the employer ratified the action in question.

The agency principle most often relevant to a claim of discrimination under Title VII is that which holds an employer liable for supervisors who utilize their powers or position to engage in the discriminatory actions. Restatement (Second) of Agency, § 219(2)(d). It has long been the law that "[w]here a loss is to be suffered through the misconduct of an agent, it should be borne by those who put it *in his powers* to do the wrong, rather than by a stranger." *County of Macon v. Shores*, 97 U.S. 272, 279 (1877) (Emphasis added.) This Court recognized in *Meritor* that employers are indisputably liable for discrimination in the firing of workers. 477 U.S. at 70-71[30]. A supervisor who fired a female employee

28. Petitioner suggests that an employer would obtain immunity under Title VII if an harassing supervisor deterred his victim from filing an internal complaint with the company. *See* part IV(b), *infra*. If that were indeed the law, the harassment would serve the company's interest, and thus be within the scope of the harasser's employment.

29. Application of several of these principles raise subsidiary questions concerning which employees' knowledge, negligence or ratification should be attributed to the employer.

30.

> [T]he lower courts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions. *E.g. Anderson v. Methodist Evangelical Hospital, Inc.*, 464 F.2d 723, 725 (6th Cir. 1972).

Anderson imposed liability on an employer for a racially motivated discharge by "a person in authority at a lower level of management", (Cont'd)

because of her sex would obviously be "aided" in doing so by his control over personnel matters, even if sex-based dismissals were forbidden by company policy. Such a discriminatory dismissal often would not fit into any other branch of agency law; few if any companies give supervisors apparent authority to discriminate, and a supervisor who acted out of simple animus towards women — as opposed to a belief that women were inferior workers — could not readily be said to be acting to advance the interest of his employer, and thus to be within the scope of his employment.

This branch of agency law is consistent with this Court's longstanding decisions regarding when the conduct of a state employee is to be deemed the action of a state itself for constitutional purposes. Like the Title VII prohibition against discrimination by an "employer", section 1 of the Fourteenth Amendment only forbids denials of equal protection and due process by a "state." This Court's analyses of what conduct by a government employee is "state" action, or "under color of law," delineate the actions that "can fairly be attributed to the State," *West v. Atkins*, 487 U.S. 42, 55-56 (1988), and identify the conduct which is the "responsibility" of a state or its agencies for which they can "fairly be blamed." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982); *see id.* at 928-29 (in case of government official, state action and under color of law requirements "are identical"). The Fourteenth Amendment only has operative effect by acting

> upon persons, not upon the abstract thing denominated a State, but upon the persons who are

(Cont'd)
despite the fact that "upper management" was "exemplary." 464 F.2d at 724; *see Henson v. City of Dundee*, 682 F.2d 897, 909 (11th Cir. 1982) ("The reason for this stern rule is readily apparent: ['] When [the employer gave] its [supervisory personnel] authority to fire employees, it also accepted responsibility to remedy any harm caused by [the supervisors'] unlawful exercise of that authority. The modern corporate entity consists of the individuals who manage it, and little, if any, progress in eradicating discrimination in employment will be made if the corporate employer is able to hide behind the shield of individual action[']").

> the *agents* of the State in the denial of the rights which were intended to be secured.

Ex parte Virginia, 100 U.S. 339, 347 (1879) (Emphasis added). Although the principles in these cases may not be applicable in every particular to the analogous issue under Title VII, they provide an established and familiar body of caselaw to which the courts should look in determining when the action of a supervisor or other worker is "employer" action.

Action by a state violative of the Fourteenth Amendment occurs whenever a state worker

> *by virtue of public position* under a State government, deprives another of property, life, or liberty, without due process of law, or denies and takes away the equal protection of the laws. . . .

Ex parte Virginia, 100 U.S. at 347. The existence of state action is particularly evident "if the act be one which there would not be opportunity to perform but for the possession of some state authority." *Home Tel. & Tel. Co. v. Los Angeles*, 227 U.S. 278, 289 (1913).

Where a state employee has utilized his position to engage in the conduct complained of, state action is present regardless of whether that use of authority may have been an ab*use* of his position. The "state" actions forbidden by the Fourteenth Amendment include actions

> where one who is in possession of state power *uses* that power to the doing of wrongs which the Amendment forbids even although [sic] the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is *efficiently aided* by the state authority lodged in the wrongdoer.

Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. at 287 (Emphasis added).[31] If such a misuse of state power has occurred, "the

31. *Id.* at 288 ("a state officer cannot on the one hand as a means (Cont'd)

actions of a state officer who exceeds the limits of his authority constitute state action for purposes of the Fourteenth Amendment." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 929 (1982). The Fourteenth Amendment constraints on the states encompass a "right not to be deprived of life or liberty by a state officer who takes it by *abuse* of his office and its power." *Screws v. United States*, 325 U.S. 91, 134 (1945) (Rutledge, J., concurring in result) (Emphasis added).

"Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color of' state law." *United States v. Classic*, 313 U.S. 299, 326 (1941). In *Monroe v. Pape*, 365 U.S. 167 (1961), this Court expressly held that abuse of authority by a state official constituted state action under color of law regardless of whether it also violated express state statutes and constitutional provisions; the commands of the Fourteenth Amendment, enforceable in a civil action under section 1983, apply to "those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it." 365 U.S. at 172. "It is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given to him by the State." *West v. Atkins*, 487 U.S. 42, 49-50 (1988).

The same principles have been applied by this Court in delineating the scope of the Fourth Amendment prohibition against unreasonable searches and seizures by the federal government. In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court recognized that government action had occurred despite the fact that the Fourth Amendment had stripped the federal employees in question of any legal authority to conduct the type of search alleged.

(Cont'd)
of doing a wrong forbidden by the Amendment proceed upon the assumption of the possession of state power and at the same time for the purpose of avoiding application of the Amendment, deny the power and thus accomplish the wrong.")

> Respondents seek to treat the relationship between a citizen and a federal agent unconstitutionally exercising his authority as no different from the relationship between two private citizens. In so doing, they ignore the fact that power, once granted, does not disappear like a magic gift when it is wrongfully used. An agent acting — albeit unconstitutionally — in the name of the United States possesses a far greater capacity for harm than an individual trespasser exercising no authority other than his own.

403 U.S. at 391-92.

The subtle but effective manner in which official power can be misused is illustrated by *Evans v. United States*, 504 U.S. 255 (1992). The defendant in that case was convicted under the Hobbs Act for "obtaining of property from another . . . induced . . . under color of official right." 18 U.S.C. § 1951(b)(2). In upholding that conviction, this Court ruled irrelevant the fact that both the defendant county official and the apparent victim, an undercover FBI agent, well knew that the defendant's proposed actions, to be taken in return for $7000 in cash, would be an abuse, not a legitimate exercise of, his government authority. Extortion "under color of official right" occurs even when it is clear to all that the public official has no legitimate claim to receive payment in return for the promised actions; the law requires only that "the services for which the fee is paid must be official and that the official must not be entitled to the fee". 504 U.S. at 270. Indeed, by definition a violation of § 1951(b)(2) occurs only when the receipt of a payment in return for the promised action is *not* authorized by law. In *Evans* no explicit threat or promise regarding the use of state power was necessary to sustain a conviction; that the money had been obtained "under color of official right" was demonstrated merely by "an implicit promise." 504 U.S. at 257. *See Amos v. United States*, 255 U.S. 313, 317 (1921) (where warrantless government agents "deman[d] admission to make search . . . under Government authority," the "implicit coercion" precludes any claim that resident waived rights by admitting them).

These principles were well established when Title VII was first enacted, and provided the familiar standard for determining whether a discriminatory act by a state supervisor would be deemed an action by the state agency for which he or she worked. In extending to certain private employers the anti-discrimination principle that grew out of *Brown v. Board of Education*, 347 U.S. 483 (1954), there is no indication that Congress intended to direct the courts to fashion some different agency doctrine. When Congress in 1972 made Title VII applicable to the states themselves, it did so by redefining "employer" in section 701 to include "governments," "governmental agencies" and "political subdivisions." It is unlikely that Congress intended that the courts, in determining whether the actions of a government supervisor were actions of a government under Title VII, were to use — indeed create — a standard different than that which had long been applied in resolving the same issue under the Fourteenth Amendment and section 1983. Nothing on the face of the 1972 amendments to Title VII suggests that Congress wanted the scope of the protections in section 703 to depend on whether the alleged victim worked for a state or local agency rather than a private firm.

A key effect of the 1972 amendments to Title VII was that the monetary relief awarded to a discrimination victim would be paid directly out of government funds, rather than being awarded against the discriminatory government official. In section 1983 actions at that time monetary awards were made only against the responsible official, although in practice most such defendants were indemnified by their employers.[32] But there is no indication that in providing for a different named defendant in Title VII actions Congress meant implicitly to redefine what conduct was official action, and thus forbidden, by the prohibition against intentional discrimination found in Title VII and the Fourteenth Amendment alike. When

32. *See* Brief for Respondent, *Bogan v. Scott-Harris*, __ U.S. __, 66 U.S.L.W. 4163 (March 3, 1998) Appendix A (listing indemnification statutes).

Congress wanted to place in Title VII limitations on the availability of monetary relief, it has done so expressly.[33]

B. Harassment Accomplished By Means Of Threats of Official Action Involve Utilization of Official Authority or Position.

The form of official power most commonly utilized to engage in sexual harassment is a contingent threat by a supervisor to use his powers against his victim if the victim takes or refuses to take certain action.[34] Petitioner is correct in asserting that such supervisory threats — explicit or at least implicit — are a widespread phenomenon in sexual harassment. (P.Br. 25.) Such threats are used in particular to coerce victims into: (a) cooperating in a sexual act ("Come to my hotel room and have sex or I will fire you"); (b) not resisting a sexual contact ("If you scream when I grope you I will fire you"); and (c) not complaining ("If you tell anyone I did this I will deny it and then fire you"). The third threat is almost invariably at least an implicit part of any other threat — few if any harassers want to be punished for, or even charged with, that misconduct. A harassment victim understands that her harasser wants her to not complain just as the parents of a kidnapped child understand that the kidnapper does not want to be paid in marked bills.

If a supervisor threatens to fire a subordinate if she refuses to have sex with him, the supervisor's use, albeit abuse, of his official power is manifest. Surely, if a judge extorted sex from a woman by threatening to rule against her in a child custody dispute, that conduct would be state action under color of law, even if the judge never ruled on the custody dispute at all. *Cf. United States v. Lanier*. __ U.S. __, 117 S. Ct. 1219 (1997). If Slowik and respondent had worked for the city of Chicago, and Slowik had obtained

33. *E.g.* 42 U.S.C. § 1981A(b)(3).

34. The district court correctly observed that "the facts of this case . . . as with so many of these cases, . . . strikingly illustrate that . . . the nation's workplaces are still filled with those who are all too eager to exploit their positions of authority. . . ." (Pet. App. 285a.)

money from her by promising that the payment would make her job "a whole heck of a lot easier," that would constitute extortion "under color of official right", in violation of the Hobbs Act. The same acts by Slowik that would be state action if engaged in by a city supervisor are, at least in this respect, the actions of an "employer" under Title VII.

The district court had no doubt that a reasonable jury could have interpreted Slowik's remarks as embodying such threats. (Pet. App. 263a-264a.) This Court's decisions make clear that an official can easily abuse his power without making any explicit threat. *Evans v. United States*, 504 U.S. at 266 n. 17 (Hobbs Act "does not require that affirmative inducement be proven"); *Amos v. United States*, 255 U.S. 313 (1921) (mere demand for entry by warrantless government agents was inherently coercive). Extortion is "under color of official right," so long as the victim reasonably believes that the payment will prevent official reprisal or obtain official favors. Implicit threats and obvious inherent dangers can intimidate a subordinate as effectively as express threats.

> Implicit quid pro quo harassment is a most serious matter. It is far more likely to take place than is the explicit variety. As time goes by and harassers learn that they can no longer victimize their prey at will, their actions become less overt.

Nichols v. Frank, 42 F.3d 503, 512 (9th Cir. 1994). Supervisors typically exercise broad discretionary powers over their subordinates; supervisors and subordinates alike understand full well that a subordinate who incurs the displeasure of his or her superior for any reason is likely to find his or her employment made unpleasant, if not terminated. The very nature of a supervisor's actions may demonstrate to his victim, and to a trier of fact, that he is exploiting a legitimate fear of retaliation. If a zoning official were to ask for a $10,000 "gift" from a businessman with a pending rezoning request, but with no prior personal relationship to the official, that act would be difficult to understand as anything other than a contingent promise of favoritism or threat of reprisal. If a supervisor makes lewd

remarks to or touches in a sexual manner a subordinate with whom he has no consensual intimate relationship, he is likely to be exploiting quite deliberately her fears of retaliation[35] if she should resist, respond with the sort of abrupt rejection that she might direct at a stranger on the street, or attempt to complain.

Although a threat of dismissal obviously involves a use of official power, it does not follow that *all* threats — or that all circumstances that might be described as quid pro quo propositions — involve such a use of authority. No such use would be involved if, without more, a supervisor attempted to extort sex by threatening to exclude his target from his carpool, to take her off his Christmas card list, or to vandalize her car. Threats by the peer of a victim often if not ordinarily would not involve exploitation of the perpetrator's authority as an employee. Only if one specifically defines a quid pro quo demand to refer only to a demand involving a use of agency powers would it necessarily be true that such a demand should be deemed the action of the employer.

Conversely, it is not the case that *only* quid pro quo demands for sexual intercourse involve a use of official power. The same power is utilized, for example, where a supervisor invokes or relies on fear of retaliation to deter a victim from resisting or complaining about groping or lewd remarks. As Judge Wood noted in the court below

> When [a] supervisor bombards an unwilling subordinate with unwanted sexual images, touching, vulgar words, or denigrating comments, only the most committed formalist would feel confident in saying when those actions cross from the imaginary line from "hostile environment" harassment to "quid pro quo" harassment. . . . The critical question, for purposes of employer liability, turns on whether the

35. Female workers frequently face retaliation when they fail to respond positively to sexual advances by their supervisors. *Chamberlain v. 101 Realty, Inc.*, 915 F.2d 777 (1st Cir. 1990); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554 (11th Cir. 1987).

> supervisor has abused the powers the employer has entrusted to him; it does not turn on the way in which the supervisor has decided to abuse them.

(Pet. App. 177a-178a.) More broadly, a supervisor may as a practical matter use his authority in any number of ways to accomplish or facilitate the sexual harassment of his victim.[36]

On the other hand, the fact that a supervisor's conduct involves an exercise of official power does not mean that actionable sexual harassment will have invariably occurred. The use of that power simply puts the perpetrator — for Title VII purposes — in the same position as the owner-operator of a sole proprietorship. No Title VII violation occurs unless the use of that power — the employer action — results in a discriminatory alteration of the terms or conditions of the victim's employment. If a supervisor — indeed, a company president — summoned a worker to his office on one occasion, and told a single off-color joke, such an isolated incident — even though the act of the employer for Title VII purposes — would not be sufficient to alter the terms and conditions of her employment. Where a supervisor makes some form of contingent threat to facilitate an act of sexual harassment, a statutory violation occurs so long as either the threatened retaliation, the intended harassment, or the effect of the threat itself would be serious enough to alter the terms and conditions of the victim's employment.[37]

The district court below properly recognized as well that threats by themselves could in some situations alter the terms and conditions

36. *E.g. Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437 (10th Cir. 1997) (supervisor ordered victim to accompany him to an isolated part of a mine where he harassed her); *Henry v. Gehl Corp.*, 867 F. Supp. 960 (D. Kan. 1994) (supervisor directed victim to stand up in front of male co-workers and then made offensive comments about her anatomy); *Rauh v. Coyne*, 744 F. Supp. 1181 (D. D.C. 1990) (supervisor by using a key possessed only by supervisors gained access to restricted area in which victim worked, and then exposed himself).

37. The legality of the conduct under Title VII should not depend on how the victim responded to the threat.

of a victim's employment. (Pet. App. 264a-66a.) Certainly daily express threats to dismiss all black or female workers would be as injurious as the harassment in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). Similarly, if a supervisor warned a subordinate, "I will dismiss you if you don't have sex with me in the next 100 days," the fact that the victim had to live in fear of dismissal, or in the shadow of such a ghastly choice, would obviously be a material and adverse alteration in the terms and conditions of the subordinate's employment.

II.

UNREALIZED THREATS OF AN ABUSE OF OFFICIAL POWER CONSTITUTE EMPLOYER ACTION.

Petitioner acknowledges that a harassing supervisor who actually employs his official powers to retaliate against a non-compliant, resisting or complaining victim "uses" his authority as an agent of the employer. (P.Br. 21, 22.) But, petitioner insists, if the supervisor makes but does not carry out a threat to misuse his officials powers, no use of that authority has occurred at all. Rather, it maintains, such a supervisor — like, apparently, a supervisor who never makes any threats at all, but only daydreams about sexual harassment and retaliation — has merely "contemplate[d]" misusing those powers. (P.Br. 22.)

If, as petitioner urges, an unrealized threat of a use of official power is not a use of that power at all, then no use of such power would be involved if the threat went unrealized because the victim had actually submitted to the demands of the threatening supervisor.[38] Consider a situation in which a supervisor calls in

38. It is somewhat unclear whether on petitioner's view there would be a Title VII violation, and employer liability, if a supervisor extorted sex from a subordinate by threatening to fire her. *Compare* P.Br. 16, 18, 31 (employer liable only if supervisor's retaliation injures tangible job benefit) *with id.* at 16, 34 (employer apparently liable in a (Cont'd)

three women and announces that he will fire them unless someone agrees to have sex with him at once; the first victim refuses and is dismissed on the spot, the second agrees and submits, and the third woman is spared the horrible choice. On petitioner's view no violation of the Title VII rights of the second and third woman would have occurred.

Petitioner's proposed distinction is patently at odds with the normal meaning of the word "use." An armed desperado who shouts "Your money or your life!" is using his weapon in precisely the way that a blackmailer uses embarrassing information to extort money. Petitioner suggests that an unrealized threat should be dismissed as mere "sabre rattling" (Pet. Br. 13, 23); but the rattling of a real sabre has serious legal consequences. A ne'er-do-well who goes into a bank and demands $10,000 will simply be asked to leave; but if he asks for the money while wearing and rattling an actual sabre, he is likely to be arrested for a felony, even if the teller never handed him any money. No one would seriously argue that a bank robber brandishing an automatic weapon does not "use" a gun unless he actually fired a round at a guard or a teller. *Bailey v. United States*, 116 S. Ct. 501 (1995).[39] The power of a

(Cont'd)
submission case). If on petitioner's view there is employer liability in a submission case, that would be dispositive of the instant appeal, since a reasonable jury clearly could conclude that Slowik got at least part of what he wanted when respondent neither vociferously rebuked nor effectively complained about his actions.

39. In *Bailey* this Court held that 18 U.S.C. § 924(c)(1), which imposes a minimum 5 year sentence on a person who "uses . . . a firearm" while committing certain crimes, requires proof of "active employment of the firearm", 116 S. Ct. at 506, such that the firearm was "an operative factor in relation to the predicate offense." 116 S. Ct. at 505. But no member of the Court suggested that that meant the defendant must have actually fired the weapon.

> The active-employment understanding of "use" certainly includes brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a

(Cont'd)

harassing supervisor to retaliate against a victim who resists or complains is not a concealed weapon; it is on the table all the time. "Any subordinate knows that the boss is the boss whether a file folder or a dinner is at issue." *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D. N.J. 1976), *rev'd on other grounds*, 568 F.2d 1044 (3d Cir. 1977).

Petitioner's argument is reminiscent of the long discredited doctrine that proof of rape requires evidence that the victim had put up a sufficiently vigorous physical defense to sustain demonstrable injuries. On that view a woman who yielded to overwhelming, even potentially lethal physical force was deemed not to have been raped at all, just as, on petitioner's view, a woman who submits to extortionate demands rather than daring her boss to fire her has not experienced a violation of her Title VII rights. But today rape law is otherwise. A man who, when proposing a sexual act to his date, mentioned that he was "contemplat[ing]" strangling her if she refused, would be guilty of a serious criminal act.[40]

(Cont'd)

> firearm. . . . [A] reference to a firearm calculated to bring about a change in the circumstances of the predicate offense is a "use", just as the silent but obvious and forceful presence of a gun on a table can be a "use."

116 S. Ct. at 508. On the other hand, "[i]f the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not 'used' ". *Id.*

40. Under Illinois law, for example, a defendant is guilty of criminal sexual assault if he "commits an act of sexual penetration by the use of force or threat of force." ILCS 5/12-13(a)(1). "Force or threat of force" is defined to include circumstances in which "the accused threatens to use force or violence on the victim . . . and the victim under the circumstances reasonably believed that the accused had the ability to execute that threat." ILCS 5/12-12(d)(1). Aggravated criminal sexual assault occurs if, in connection with a criminal sexual assault,

> the accused displayed, threatened to use, or used a dangerous weapon or any object fashioned or utilized

(Cont'd)

The pivotal legal distinction proposed by petitioner among reprisals, submission and simple threats would often be difficult to administer. It would be necessary in each case to determine whether a particular action was intended by the perpetrator as a form of retaliation, or was regarded by him as an act of submission. If, for example, Slowik, having failed in his first threat, then decided to retaliate against respondent with a campaign of additional threats, touching, and smarmy remarks, this would be a retaliation case. On the other hand, if the particular sexual contact that Slowik was after all along was groping and whatever pleasure he took from subjecting respondent to sexual remarks, then this would be a submission case. Surely the presence or absence of a Title VII violation should not turn in this way on the mentality and sexual tastes of the harassing supervisor.

III.

AN ABUSE OF OFFICIAL POWER CONSTITUTES EMPLOYER ACTION REGARDLESS OF WHETHER THE THREATENED OR REALIZED HARM IS "TANGIBLE".

Petitioner argues in the alternative that a supervisor's discriminatory use of his official power does not constitute an action by the employer (and thus is not in and of itself illegal under Title VII) unless that action has (or if taken would have had) a "tangible" effect on the victim's terms and conditions of employment. The evident purpose of this argument is to create a legal distinction between injuries which are "tangible" and those which are not, establishing for the latter a different, more stringent set of liability rules. According to petitioner, the use of official power to harass, retaliate against, or otherwise discriminate against a subordinate

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(Cont'd)
in a manner as to lead the victim under the circumstances reasonably to believe it to be a dangerous weapon

or "the accused caused bodily harm to the victim." ILCS 5/12-14(1) and (2).

would be the act of the employer if, but only if, the injuries that resulted were "tangible".

The nature of the distinction which petitioner proposes is quite unclear. Petitioner offers no standard for distinguishing injuries that are "tangible" from those that are not. Petitioner repeatedly indicates that an injury must be "economic" to be tangible (P.Br. 16 n. 11, 17 n. 13, 33, 34), but elsewhere disavows any such restriction. (P.Br. 28 n. 19.) Some portions of petitioner's argument seem to insist on a formal directive altering a victim's job parameters (P.Br. 14), while others require only that there be "adverse job consequences." (P.Br. 13, 32.) Petitioner at one juncture suggests that injuries caused by threats could never be tangible (P.Br. 17 n.14), but it is unclear how petitioner would treat a threat so serious that it led the victim to resign, e.g. a threat to fire the subordinate on a false charge of theft if she did not immediately provide sexual favors.

Mixed in with petitioner's proposed "tangible" requirement is a second, quite different proposal by Chief Judge Posner, that the discriminatory use of official power must be a "company act." (P.Br. 17 n. 14, 21, 23.) This doctrine seems to relate, not to the magnitude of the injury, but to whether the invidiously motivated action was formalized in some way that would be "subject to . . . review by higher-ups in the company." (Pet. App. 49a.) Thus, apparently, a supervisor's action formally reducing a worker's pay by one cent an hour would be a company act and thus illegal under Title VII, but the same supervisor's harassment of the worker in a way that interfered with her job performance, or even direct interference with her work — denying supplies, refusing to provide information or to fill orders — would not be a company act, even though it might cost the victim thousands of dollars. The lower court opinion which petitioner cites for the "company act" doctrine evidently understands it to apply only to major actions, such as dismissals and demotions (Pet. App. 49a); petitioner, on the other hand, asserts that such things as changes in a job title, exclusion from work on a committee, or an adverse performance review would all constitute "tangible" alterations in a victim's employment.

(P.Br. 12, 17 n. 13, 22.) Conversely, although Chief Judge Posner would treat constructive discharge as a "company act" (Pet. App. 54a-55a), petitioner necessarily takes a different view, since the instant case involves just such a constructive dismissal claim. (Pet. App. 286a-287a.)

These vague and conflicting proposed restrictions on the scope of Title VII have no evident basis in either Title VII or the principles of agency law. The suggestion that sexual harassment or other discriminatory acts should be treated less seriously under Title VII if the injuries they cause are not "tangible" was expressly considered and rejected in *Meritor*, which refused to read into Title VII that very term. 477 U.S. at 64.[41] The central purpose of Congress when it amended Title VII in 1991 to permit awards of compensatory damages was to provide redress for *non*-economic injuries that were often caused by Title VII violations but which fell outside the scope of equitable back pay awards.[42] Petitioner urges this Court to read back into Title VII precisely the distinction that this Court rejected in 1986 in *Meritor* and that Congress repudiated in 1991.

Title VII establishes a number of distinct elements to a discrimination claim, including whether the discrimination was

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41.

> Petitioner ... contends ... that in prohibiting discrimination ... Congress was concerned with what petitioner describes as "*tangible* loss" of "an economic character," not "purely psychological aspects of the workplace environment." ... We reject petitioner's view.... [T]he language of Title VII is not limited to "economic" or "*tangible*" discrimination. The phrase "terms, conditions, or privileges of employment" evinces a congressional intent 'to strike at the entire spectrum of disparate treatment of men and women' in employment.

(Emphasis added.)

42. H.R. Rep. No. 102-40(I) 64-69 (1991); H.R. Rep. No. 102-40(II) 24-25 (1991).

the act of an "employer", and whether the discriminatory act was serious enough to alter the terms or conditions of the victim's employment. Petitioner's tangible company act theory conflates these two separate elements, resulting in an ill-defined doctrine under which the issue of whether an action is the act of an employer apparently depends on the magnitude or type of injury caused. By recognizing a category of discriminatory abuse of official power for which an employer will not ordinarily be liable, the doctrine provides an incentive for discriminatory supervisors coyly to adjust the misuse of their powers to cause or threaten only non-"tangible" discriminatory injuries, even though those threats or injuries may in practice be entirely sufficient to extort sexual favors or to drive a victim to resign.

There is no empirical basis, and little logic, to support petitioner's contention that an employer is better able to prevent discrimination which is "tangible." If a supervisor announces to a subordinate that he will fire her unless she performs a sexual act, the victim *knows* that harassment has occurred, and there is an eyewitness — the victim herself. But if the same supervisor refuses to hire a job applicant because she is a woman, the victim often will have no idea whether discrimination may have occurred, usually being unaware even of the identity or credentials of the successful applicant, and there will ordinarily be no eyewitness with direct evidence of a discriminatory motive. The ease with which a company president could detect discriminatory practices would probably have more to do with the size of the company, and with whether the practices were systemic or isolated, than with the type of discrimination occurring. In any event, federal judges certainly lack the breadth of managerial experience necessary to determine whether petitioner's fact-bound contention, or the opposite view, is correct.

IV.

THE ADOPTION OF AN ANTI-HARASSMENT POLICY IS NOT A PER SE DEFENSE TO A TITLE VII SEXUAL HARASSMENT CLAIM.

(a) Petitioner insists that, regardless of whether respondent was in fact afraid that Slowik or others would retaliate against her if she resisted or complained, that fear was not "reasonable" because respondent had a policy against sexual harassment. (P.Br. 20, 29.) We agree that proof of a threat-based use of authority requires a showing both that the victim was afraid and that that fear was reasonable. Evidence that a defendant had an anti-harassment policy could properly be considered by a trier of fact in determining the reasonableness of such fears, but that one circumstance would assuredly not be dispositive, since there is a wide variety of other facts that would be equally probative. Under the circumstances of this case, petitioner has fallen far short of the showing required by Rule 56(c) that there was no "genuine issue" regarding whether it would have been reasonable for respondent to fear retaliation.

Petitioner's contention cannot appropriately be raised at this juncture in the litigation. The reasonableness of respondent's fear of reprisals is necessarily a factual question. In its summary judgement motion, however, petitioner never asserted that there was no genuine issue on this matter; indeed, petitioner did not refer at all to the reasonableness of respondent's apprehensions. This issue cannot fairly be said to be encompassed within the question presented.

The anti-harassment policy on which petitioner relies consists of one sentence: "[T]he company will not tolerate any form of sexual harassment in the workplace."[43] Petitioner relies exclusively on the existence of this single statement; it put in the record no evidence of steps that it had taken to implement the statement, of training of supervisors, of meetings with possibly vulnerable

43. Doc. 14, Ex. F, p. 3.

subordinates, or of disclosure of actions taken internally to deal with past problems. Petitioner does not claim, or at least proffered no evidence, that it had safeguards in place to protect complainants from reprisal, nor does it explain the procedure that would be followed in investigating a complaint. It is unlikely that an employer of the size of petitioner would never have received a sexual harassment complaint, but petitioner offered no evidence regarding how it had dealt with past problems, let alone regarding how respondent might have been aware of petitioner's past record[44].

The existence of a policy against sexual harassment obviously does not guarantee that no such harassment will occur; in the instant case respondent offered detailed testimony that Slowik did in fact engage in a campaign of harassment that violated that very policy. Similarly, the mere existence of that same policy does not guarantee that neither her harasser nor others would be able to engage in retaliatory action or to continue that harassment following the filing of a complaint. An anti-harassment policy, unlike the seniority provisions in a collective bargaining agreement, is not a mechanical rule certain to be implemented once invoked. Petitioner does not assert that its officials will always root out, with complete good faith and unerring accuracy, any harassment about which a complaint is received; it seeks an "opportunity" to do so, but does not and could not guarantee that its supervisors will utilize that opportunity.

A complaint about harassment or retaliation may for several reasons be unavailing despite the existence of a formal anti-harassment policy. It is virtually certain that an accused harasser will emphatically deny the allegations; if the critical evidence is of the "he said, she said" variety, the responsible officials may err in their assessment of that evidence or may simply be unsure of what occurred. If the company, in perfectly good faith, erroneously concludes that no harassment has occurred, the harasser may even

44. In her opposition to petitioner's motion for summary judgment, respondent stated regarding the sexual harassment policy, "I was not aware of whether it was being enforced." (Pet. App. 272a.)

be emboldened, leaving the victim considerably worse off than if she had never complained at all. The company's assessment of the facts may be colored if the alleged perpetrator is of longer tenure, and thus better known, or simply more valuable to the employer. The decisionmaking official may also be swayed by personal favoritism, a disagreement with the firm's policy, an unduly narrow view of what constitutes harassment, or concern that a finding of harassment may lead to excessive sanctions against the perpetrator or might open the employer to legal liability.

Respondent did not simply rely on these general but very real risks. She adduced evidence that the alleged harasser had been with the company since 1965, and held the position of vice president; petitioner, who was the target of harassment before she was ever hired and who survived on the job only fourteen months, could reasonably assume that Slowik's actions reflected his well informed understanding regarding the unlikelihood that petitioner would actually enforce against him the policy in question[45]. Slowik made several of the remarks in question in front of Vice President Brenna; it was only prudent for respondent to infer from this that Slowik was confident that Brenna, despite the nominal policy in question, would take no action, as indeed he did not. Respondent complained to one of the company supervisors, Donna Thibideau, and several other Burlington employees, all of whom had more years of experience at the firm than she did. So far as appears from the record, none of them assured her that Slowik could never get away with retaliation, or that a complaint was likely to be both successful and reprisal free. Petitioner suggests that it would have been appropriate and effective for respondent to complain to Patrick Lawrence, who was Slowik's subordinate; in *Faragher v. City of Boca Raton*, No. 97-282, however, the defendant has taken precisely the opposite position, insisting that a harassment victim

45. Slowik was asked at his deposition whether he was aware of any employee ever having been disciplined by petitioner for sexual harassment. That question and his answer, however, were not put in the record by either party.

should realize that a complaint to the subordinate of the perpetrator would obviously be pointless.[46]

The difficulty faced by a harassment victim trying to assess whether to file an internal complaint is complicated by the fact that her prospects turn, not only on the contours and reality of a company's policies, but also on her specific circumstances. The temperament of a given perpetrator may color the seriousness of his threats, and his power and influence in the firm may affect his own supervisors' likely response. An at-will or newly hired worker will usually be at greater risk than a long-time employee with seniority rights and the assistance of an aggressive union. The degree to which the harasser in question actually controls his victim's employment, both his ability to dismiss her and his capacity to make her life miserable, will vary from case to case. A supervisor who is an accomplished liar may be more of a threat than a bumbling bully.

(b) In the alternative, petitioner and one of its amici[47] urge this Court to adopt a per se rule requiring dismissal of at least certain sexual harassment cases if a plaintiff has failed to utilize an employer's internal complaint process. (P.Br. 13, 20.) Neither, of course, suggests that the Court should adopt such a rule for any other type of Title VII violation, such as discrimination in hiring or wages or racial discrimination.

The threshold problem posed by this proposed rule is that it would require the courts to decide precisely which employer-created plans are to be given such an extraordinary preclusive effect. Petitioner itself simply does not address this issue. The EEAC describes the internal procedures which a harassment victim must, at her peril, invoke, as company processes which are "adequate" (EEAC Br. 7, 17), "good" (*id.* at 22), "accessible" (*id.* at 18), "effective" (*id.* at 20, 22), "aggressive" (*id.* at 23), "the finest" (*id.*) and "the most conscientious." (*Id.*) Fashioning such a standard

46. Brief for Respondent, p. 45.

47. Brief Amicus Curiae of the Equal Employment Advisory Committee, pp. 17-23.

would require the courts to establish requirements about the terms of a written policy, the type and frequency of training, meetings, warnings and notices, whether an employer should publicize disciplinary actions, measures to assure privacy and prevent reprisals, standards of proof, and levels of sanctions. The necessary elements of a plan would obviously vary from employer to employer; the level of specificity, type and formality of process that a court might deem sufficient for employees of the National Organization for Women could well be palpably inadequate at the Aberdeen Proving Ground.

The policy argument underlying petitioner's contention--that employers should be accorded an opportunity to resolve discrimination problems less formally before they are sued--was to some degree accepted by Congress, but the statutory scheme fashioned by Title VII to address these concerns is entirely different than what petitioner proposes. Under Title VII a discrimination victim is already required to pursue less formal mechanisms before bringing suit. Under section 717(c) federal employees must file a complaint with their agency; state, local and private employees are required by section 706 to file charges with either the EEOC or certain state agencies certified for that purpose by the EEOC. The congressional decision to permit all but federal employees to take their complaints to an outside agency reflects Congress's understandable concerns about retaliation against complainants. Section 704 forbids in sweeping terms any form of discrimination against "any individual . . . because he has opposed any practice made an unlawful employment practice by the Title". In addition, section 706(b) authorizes members of the EEOC itself to file commissioner's charges, a process designed for situations in which Congress anticipated that all of the individual discrimination victims would be legitimately afraid to file their own complaints.

This system created by Congress differs in important respects from the scheme proposed by petitioner. First, Congress quite deliberately provided that only one group of employees — those who work for the federal government — would be required to file their complaints with their own employer; the forum provided for

all other employees was the EEOC or an independent state agency. Petitioner would allow any private employer in the nation to assume the special role that Congress saw fit to accord only to federal agencies. Under section 706 respondent was required to, and did, file an administrative complaint with the Illinois Department of Human Rights; nothing in Title VII authorizes the courts or petitioner to create an additional requirement that respondent also file with the Burlington Industries Department of Human Resources. Second, Title VII establishes specific procedures and substantive standards which must be followed by the EEOC or federal or state agencies in processing complaints. The EEOC in turn has promulgated stringent regulations which a state agency must meet before complainants are required to file charges with them, 29 C.F.R. §§ 1601.70-1601.79, and carefully evaluates at least once every three years the quality of each state agency's work. 29 C.F.R. § 1601.78(a). None of these safeguards would apply to an employer's own homegrown complaint process.

The specific proposal now advanced by petitioner regarding sexual harassment was expressly rejected by Congress in 1991. Both the House Judiciary Committee[48] and the full House[49] considered and rejected proposed language, sponsored by Minority Leader Michel and the Bush administration, which would have required sexual harassment victims to utilize employer internal complaint procedures[50]. In the absence of such a complaint, under

48. H.R. Rep. No. 102-40(I) 103 (1991). The committee explained it had rejected this proposal because "[s]uch a rule would in effect punish the *victim*, particularly given testimony the Committee received . . . that . . . '[v]ictims perceive that to come forward within their workplaces is to be labeled as "troublemakers" or "oversensitive." ' " *Id.* (Emphasis in original.)

49. 137 Cong. Rec. H3908 (daily ed. June 4, 1991).

50. The Michel proposal would have amended section 703(a) of Title VII, defining unlawful employment practices, by adding a new subsection (3) declaring it unlawful

> to harass any employee or applicant for employment

(Cont'd)

the Michel proposal, there would have been no violation of Title VII. Representative Michel offered in support of this proposal arguments similar to those now advanced by petitioner.[51] In successfully opposing this proposal, Representative Mink argued that it would be wrong to impose additional obstacles on sexual harassment victims, who already "take an enormous amount of courage before they step forward."[52]

Petitioner urges that employers will have no incentive to establish anti-discrimination policies and procedures if the creation of those measures is not rewarded with complete immunity from suit. (P.Br. 23.) But as even the Chamber of Commerce acknowledges, regardless of whether immunity is obtained, such procedures will if effective serve two compelling employer interests — by actually preventing sexual harassment these procedures both

(Cont'd)

> because of that individual's race, color, religion, sex, or national origin. *Provided, however,* That no such unlawful employment practice shall be found to have occurred if the complaining party failed to avail himself or herself of a procedure, of which the complaining party was or should have been aware, established by the employer for resolving complaints of harassment in an effective fashion within a period not exceeding ninety days.

137 Cong. Rec. H3897 (daily ed., June 4, 1991) (bound in the daily edition volume for June 5, 1991). (emphasis in original.)

51. Representative Michel explained that this proposal, by barring lawsuits by harassment victims who had failed to utilize an employer's complaint process, would "encourage employers to adopt meaningful complaint procedures" and would "encourage employees to use them. The employer will not be found liable if the complaining party failed to avail himself or herself of an effective complaint procedure." 137 Cong. Rec. H1666 (daily ed., March 12, 1991).

52. 137 Cong. Rec. H3904 (daily ed. June 4, 1991) (this passage is bound in the daily edition of June 5, 1991); *see id.* at H3850 (remarks of Rep. Kennelly) ("the language in the Michel substitute stacks the deck in favor of the harasser.")

minimize litigation and avoid the harms to employee morale and productivity that harassment can bring about.[53] This Court noted in *Landgraf v. USI Film Prods.*, 511 U.S. 244, 283 n. 35 (1994), that "[t]he new damages provision . . . can be expected to give managers an added incentive to take preventative measures to ward off discriminatory conduct by subordinates *before* it occurs." (Emphasis in original.) The House Committee which rejected the Bush administration exhaustion proposal believed that the resulting bill was best calculated to provide incentives to employers to end harassment.[54] Title VII has never afforded employers this species of immunity regarding forms of discrimination other than sexual harassment, and petitioner does not suggest that that lack of immunity has somehow diminished employer efforts to eradicate such other discriminatory practices. Practical experience demonstrates that the lack of immunity spurs, rather than deters, preventative measures. Employers are strictly liable if company drivers speed or drive drunk while on company business, yet they do not for that reason take less seriously the need to prevent such misbehavior.

This proposal, moreover, cannot be reconciled with the fact that a supervisor will in practice be able to exploit his authority to harass a subordinate so long as the subordinate reasonably fears retaliation for resistance, non-compliance, or complaint. A company policy and procedure that might seem generally sufficient could well be inadequate in particular instances to alleviate reasonable fears about specific supervisors (e.g. the boss's son) or on the part of particular workers. Title VII does not guarantee that in every situation, or at every worksite, it will actually be possible to alleviate reasonable fears. Although the United States armed forces have been making serious efforts to deal with sexual harassment, it is likely that many women in the military today would quite reasonably be wary of complaining about sexual harassment; we set out in the appendix to this brief a recent report regarding the

53. Brief Amicus Curiae of the Chamber of Commerce of the United States of America, p. 17.

54. H.R. Rep. No. 102-40(I) 65, 69-70 (1991).

professionally disastrous consequences that have befallen the complainants in the case of Sergeant Major Gene McKinney.

(c) Petitioner and its amici exhibit a certain obliviousness to the complex plight of a victim of sexual harassment by a supervisor. Their briefs proceed on the implicit assumption that filing a sexual harassment complaint against one's boss is like returning a defective toaster to K-Mart, an action which is virtually certain to succeed and which cannot conceivably lead to reprisals. In the real world, however, a complainant would be foolhardy to heed only the words of a paper policy, ignoring the corporate culture and personalities involved[55]. Retaliation against sexual harassment complainants is a widespread problem.[56] An employee who files a sexual harassment complaint against her supervisor is necessarily gambling her job, if not her entire career, on the outcome and collateral consequences of that process.

A harassment victim who files an internal complaint risks a wide array of negative consequences. Any subordinate's complaint about his or her boss is fraught with peril; a complaint of sexual

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55. Giving a public speech denouncing the city mayor as incompetent and corrupt would assuredly be safe, and possibly efficacious, in Pekin, Illinois, but that same course of action remains fraught with peril in Beijing, China, even though written guarantees of free speech exist in both jurisdictions. Constitution of the People's Republic of China (1982), Art. 35 ("Citizens of the People's Republic of China enjoy freedom of speech, of the press, of assembly, of association, of procession and of demonstration"), in Albert P. Blaustein and Gisbert H. Flanz, eds., *Constitutions of the Countries of the World*, v. iv (1991).

56. *E.g. Saulpaugh v. Monroe Community Hospital*, 4 F.3d 134 (2d Cir. 1993); *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988); *Rufo v. Metropolitan Life Ins. Co.*, 1997 U.S. Dist. LEXIS 18011 (E.D. Pa. Nov. 4, 1997); *Davis v. Palmer Dodge West, Inc.*, 1997 U.S. Dist. LEXIS 14191 (S.D. Ind. Sept. 2, 1997); *Shipbaugh v. Boys & Girls Club of Am.*, 883 F. Supp. 295 (N.D. Ill. 1995); *Henry v. Gehl Corp.*, 867 F. Supp. 960 (D. Kan. 1994); *EEOC v. Metzger*, 824 F. Supp. 1 (D. D.C. 1993); *Mead v. Fidelity & Guaranty Co.*, 442 F. Supp. 114 (D. Minn. 1977).

harassment is particularly explosive and often difficult to prove. Such a complaint will assuredly destroy the victim's professional relationship with the harasser, who may well have been one of her mentors. The harasser himself may retaliate against a complainant for having filed a complaint; even if the harasser does not, indeed, even if (or perhaps because) the harasser is punished, other employees may retaliate. The complainant may find her motives, her professionalism or her sexual history savaged by the harasser or his partisans. If the underlying complaint is unsuccessful, the complainant may find herself branded a liar, and the perpetrator, or others, may be emboldened by the failure of the complaint. A worker who files complaints of this sort runs a risk of being branded as a troublemaker. Given these dangers, all too often the most prudent course for a harassment victim is to try to ignore the problem, or, if it persists, quietly to look for another job. A job applicant who simply resigned from her last position often will have better employment prospects than a worker who was fired in retaliation for having filed a complaint.[57]

To a harassment victim trying to decide whether to complain about a harassing supervisor, the overriding consideration will be the magnitude of the professional and economic risks she would be taking and the egregiousness of the harassment. The best way for an employer to elicit such complaints is aggressively to reassure victims that complaints will not lead to even greater problems, and will have a reasonable chance of bringing about an end to the abuse. An employer's threat that non-complainants will forfeit their Title VII rights will do little to encourage such complaints. The first priority of discrimination victims is not lawsuits but continued employment; workers who live from paycheck to paycheck need their jobs to pay the rent and feed their families. *See Ford Motor*

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57. Judge Posner noted that an harassment victim who complains and is dismissed in reprisal would be worse off than a victim who quietly resigned if the complainant wanted a job reference for future employment. (Pet. App. 58a). Except for harassment victims on the verge of retirement, *all* victims are likely to need such favorable job references.

Co. v. EEOC, 458 U.S. 219, 221 (1982). Few employees would be so brave, if not foolhardy, as to imperil those immediate needs simply to preserve the uncertain possibility of a Title VII lawsuit. Most harassment victims never sue, few can find attorneys who will represent them without a substantial retainer, and civil litigation is both unpredictable and slow; the discrimination at issue in *Meritor* and *Harris* had occurred six to twelve years before those cases reached this Court. Where reasonable fear has deterred a harassment victim from complaining about severe or pervasive abuse, an interpretation of Title VII barring her on that account from suing for damages or back pay would simply add injury to insult.

Where a supervisor trades on fear of his official powers to engage in sexual harassment, an implicit threat of retaliation for any complaint will normally be present. If that threat succeeds in deterring the filing of a complaint with an employer, petitioner proposes to sanction, not the harasser, but the victim. This is rather like punishing the parents of a kidnapping victim for failing to go to the police. The effect of the sanction proposed by petitioner, in this and any other case, would be to bar judicial inquiry into the merits of the harassment complaint, thus preventing discovery which might reveal the harasser's culpability. Thus petitioner's proposed rule operates to abet the harasser's abuse of authority; a harasser who succeeds in deterring his victim from filing an internal complaint will also be assured that the victim can never sue under Title VII. This would be a singularly perverse interpretation of Title VII.

V.

THIS CASE PRESENTS GENUINE ISSUES OF MATERIAL FACT REGARDING WHETHER A VIOLATION OF TITLE VII OCCURRED.

Petitioner does not deny that respondent could reasonably have understood Slowik's various remarks as threatening retaliation if she did not do as he wished. The district court concluded that

> a reasonable jury could find that Slowik's conduct . . . could be regarded as reinforcing Slowik's previous persistent implicit messages to [respondent] that . . . her growth in the company was dependent upon her sexual availability to him.

(Pet. App. 263a; *see id.* at 263a-264a.)

A reasonable jury could surely conclude that Slowik's actions were facilitated by his position of authority over respondent. As the district court correctly observed,

> Slowik certainly invoked his apparent authority when he asserted that he could make Ellerth's life at Burlington very easy or very hard, and it was precisely the existence of the agency relationship that permitted Slowik the opportunity to exploit his position of authority and harass Ellerth.

(Pet. App. 277a.) It is obvious that if Slowik had been the Merchandising Assistant, and respondent had been the Vice President for Sales and Marketing, Slowik would not have dared to touch respondent's buttocks, to comment on the size of her breasts, to ask if she was "practicing" to have a family, or to refuse to respond to inquiries from his boss until she described what she was wearing.

Petitioner does not dispute the district court's conclusions that a reasonable jury could conclude that the harassment facilitated by abuse of Slowik's position was sufficiently severe and pervasive to alter the terms and conditions of respondent's employment. (Pet. App. 264a-266a.) At this preliminary stage of the litigation it is necessarily unclear whether the case involves reprisals by Slowik, submission by respondent, or both. Slowik certainly made good on his threat to make respondent's work difficult. Respondent's Title VII charge squarely alleged that the harassment leading to her constructive discharge was in reprisal for her opposition to sexual harassment. If Slowik's particular sexual desire was in part to be able, without vehement objection, to touch respondent on the buttocks, or to engage in lewd remarks, this would also be a

submission case.[58] Slowik assuredly wanted respondent to refrain from complaining about his actions and remarks; petitioner acknowledges that respondent acceded to this demand, indeed objects that she did so, blaming in this case the victim rather than the perpetrator.

CONCLUSION

Accordingly, respondent respectfully requests that the *en banc* decision of the United States Court of Appeals for the Seventh Circuit on the issue presented be affirmed.

Respectfully submitted,

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58. That some individuals find sexual stimulation short of intercourse to be desirable is demonstrated, for example, by the popularity of magazines such as Playboy and the proliferation of telephone sex lines.

APPENDIX

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APPENDIX A — NATIONAL PUBLIC RADIO REPORT DATED MARCH 17, 1998

NATIONAL PUBLIC RADIO, MORNING EDITION, MARCH 17, 1998

Aftermath of McKinney Trial

* * *

BOB EDWARDS, HOST: This is MORNING EDITION. I'm Bob Edwards.

Army Command Sergeant Major Gene McKinney is to be reprimanded and demoted in rank. That was the verdict yesterday of a military jury which last week acquitted him of all charges of sexual misconduct. McKinney was convicted on one charge of attempting to obstruct the investigation.

With the criminal trial now over, McKinney has begun a civil action against one of his accusers.

NPR's Barbara Bradley reports from Fort Belvoir, Virginia.

BARBARA BRADLEY, NPR REPORTER: For the first time in six weeks, Gene McKinney left the courtroom knowing his future. He will retire honorably after a stellar career, but with a federal criminal conviction on his record. He will not have to go to jail, but will suffer financially since his demotion to master sergeant, two ranks below the one he held at the pinnacle of his career, will result in a much smaller pension.

As he left the courthouse, he told CNN he was relieved it was over.

Appendix A

ARMY COMMAND SERGEANT MAJOR GENE MCKINNEY: We're gonna move on with our lives in spite of this long, extensive investigation. And we did OK.

BRADLEY: He certainly did, considering the possibilities. After six women accused McKinney of sexual misconduct, ranging from assault to adultery, he faced 55 years in jail and a dishonorable discharge. So, when the jury cleared him of all but one of the 19 charges on Friday, his prospects brightened dramatically. That lone conviction, obstruction of justice, puzzled many people, but not McKinney's Army lawyer, Lieutenant Colonel James Gerstenlauer.

ARMY LIEUTENANT COLONEL JAMES GERSTENLAUER, ARMY LAWYER FOR GENE MCKINNEY: The system worked. Everybody had their day in court. They got to tell their story. He got to tell his. This was not a kangaroo court. This was not a rubber stamp. This was military justice at its best.

BRADLEY: His accusers don't quite see it that way. But McKinney's chief accuser, Staff Sergeant Christina Fetrow (ph), notes that McKinney leaves with his honor tarred and his retirement pay reduced. McKinney will lose more than a quarter of his retirement pay from what he would have received as Sergeant Major of the Army, although McKinney's attorneys will appeal so that he can receive the full amount.

Still, Fetrow says she takes some solace in the punishment, since she expected the jury to give him none at all.

ARMY STAFF SERGEANT CHRISTINA FETROW: He did get demoted. He is Sergeant McKinney now. He is a convicted felon. So, all those put together, I could say I'm satisfied.

Appendix A

BRADLEY: But Fetrow and the other five women say the end of the trial is hardly the end of their ordeal. Each of their lives has been fundamentally changed by what they still claim McKinney did to them and by the ensuring investigation.

Fetrow says after she began cooperating with the government, she received death threats and she had to enter a witness protection program. Her friends distanced themselves from her, afraid to hurt their careers. She tells of living out of a suitcase and spending Christmas alone because she didn't want to endanger her family.

FETROW: I've felt threatened. I've felt isolated, alone. I've just felt like I was doing the right thing, but I would constantly ask myself, at what cost and for what?

BRADLEY: And like Fetrow, Sergeant Christine Roy (ph) says if she had known what was ahead, she might never have come forward with her allegations.

Many observers say Roy's story was the most credible. Certainly it was the most explicit. Roy says McKinney forced her to have sex with him in October 1996, when she was seven-and-a-half months pregnant.

Though the defense did not introduce evidence that Roy was a liar and a fraud, as it did with Fetrow and the other women, it did suggest she made her allegations out of spite — she was upset that McKinney didn't offer her a job. Roy says after the past year, any naivete she once had is gone.

ROY: Now, I don't care. I don't care what you think of me. I don't care what I say to you. I don't care if I talk to you. It's just

— it's changed my personality completely. Sergeant Major McKinney took my personality, used it, abused it, and threw it away.

BRADLEY: Army personnel say it was an eight-member jury and not the policymakers at the Pentagon that delivered the McKinney decision. Yesterday, Army Chief of Staff Dennis Reimer reiterated that the service has zero tolerance for sexual harassment and will continue to prosecute those cases vigorously. He added that McKinney's accusers should remember that as they return to their bases and pick up their lives.

GENERAL DENNIS REIMER, ARMY CHIEF OF STAFF: And we will work with them to assure that we do protect their privacy and protect their careers and work with them in terms of what they want to do in the future.

NAVY PETTY OFFICER JOHNNA VINSON: I respect General Reimer. However, I think that statement is naive.

BRADLEY: Navy Petty Officer Johnna Vinson, who also accused McKinney of propositioning her for sex.

VINSON: I don't think he will be able to protect those women. I don't need protection from the Army. However, those couple of people who are still on active service in the Army do need protection and they will not be able to get it.

BRADLEY: In fact, of the three active servicewomen NPR interviewed, all said they are going to leave the military. Fetrow says she's branded as a liar and a fraud, not exactly the credentials for career promotion. Christine Roy also says she's leaving. She believes she'd never make it past the rank of sergeant.

ROY: Unfortunately, my career is over. I don't have the energy to continue this battle in this military as it stands. But if I did, I believe I wouldn't even be able to. I'm no longer competitive for promotion. I would be blackballed. And I think it would be very difficult and very trying, and, quite frankly, I don't have the energy for it.

BRADLEY: Even for the woman who has left the military, the McKinney trial will resonate for some time. Brenda Hoster was the first to come forward with her allegations, allegations that McKinney had asked her for sex while they were attending a conference in Hawaii in April, 1996. Last February, after McKinney was appointed to a panel investigating sexual harassment in the Army, Hoster went to The New York Times with her story and later to network television.

Now that move, which ultimately resulted in the year-long investigation, has made Hoster the target of a lawsuit herself. The Sergeant Major of the Army is suing Hoster for [libel] and seeking $1.5 million in compensatory and punitive damages.

McKinney's civilian lawyer, Charles Gittens, was asked why McKinney would prolong the ordeal with a civil suit.

CHARLES GITTENS, CIVILIAN ATTORNEY FOR GENE MCKINNEY: Because you don't get to lie on national TV about people. That's why. You don't get to be personally aggrandized on somebody's else's back, as Brenda Hoster did. You don't get to make false allegations on national TV. Brenda Hoster needs to learn that lesson and we intend to — we intend to give it to her.

BRADLEY: McKinney cannot sue the other five women who remain in the military. Under the so-called Ferris (ph) Doctrine, no one in the military can sue a superior or a subordinate.

As for Hoster, she's confident that the very high legal standards to prove [libel] will protect her, and several lawyers agree.

But Hoster says she has another concern, one echoed by the five other accusers. She says that the Army threw money, people, and resources into prosecuting McKinney, but the case failed. So, what woman would want to come forward now?

ARMY SERGEANT MAJOR BRENDA HOSTER (RET.): I think it's gonna take a long, long time for women to want to trust the system after they see — they have seen what we've been through. Who would want to do this, knowingly do this? So, I think that what that does is that just opens it up. It's open season once again on the women.

BRADLEY: For now, Hoster will return to El Paso, where she has a personal service business, running errands and cleaning houses. And both she and McKinney will be busy preparing to meet again — the next time in the district court of Washington, DC.

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